No. 89-1664

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

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STATE OF NEW MEXICO, Petitioner

vs.

TERRY CALLAWAY AND MIKE C. MOLINAR, Respondents

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO

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# RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL E. VIGIL
Marchiando, Vigil & Voegler
P.O. Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

Counsel of Record

PETER B. RAMES
Assistant Appellate Defender
Public Defender Department
142 Lincoln Avenue, Suite 500
Santa Fe, New Mexico 87501
(505) 827-3900

Counsel for Respondents

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The respondents, Terry Callaway and Mike C. Molinar, respectfully pray that no writ of certiorari issue to the Supreme Court of New Mexico, to review the opinions entered in Callaway v. State on January 25, 1990, and in Molinar v. State, on February 27, 1990.

## OPINIONS BELOW

The New Mexico Supreme Court's opinion in Callaway v. State is reported at 785 P.2d 1035, and will be reported at 109 N.M. 416. The New Mexico Supreme Court's opinion in Molinar v. State is reported at 787 P.2d 455. Both opinions are reprinted in Appendix A of the State of New Mexico's petition.

The New Mexico Court of Appeals' formal opinion in State v. Callaway is reported at 787 P.2d 1247. The New Mexico Court of Appeals issued a memorandum opinion in State v. Molinar. Both opinions are reprinted in Appendix B of the State of New Mexico's petition.

## STATEMENT OF JURISDICTION

The State of New Mexico filed its petition for certiorari April 16, 1990, invoking this Court's jurisdiction pursuant to 28 U.S.C. 1257(a). This brief in opposition will be timely if filed on or before Monday, May 14, 1990.

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V (Double Jeopardy Clause):

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb;..."

U.S. Constitution, Amendment XIV (Due Process Clause):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law;..."

## CORRECTIONS TO THE STATEMENT OF THE CASE

Respondents respectfully bring to this Court's attention several inaccuracies and omissions in the petitioner's statement of the case. At least one of these inaccuracies is so fundamental as to require a rewording of the issue presented.

First: Respondents accept the statement of the charges brought against them as recited by the state, except that there is no crime of "gang-rape", or rape, in New Mexico. It was part of the defense theory of the case that Ms. Lewis had either not been raped at all, or was accusing the respondents out of fear of whoever had actually assaulted her. Testimony was elicited from the Emergency Room nurse who first examined Ms. Lewis at the hospital that Ms. Lewis said she had been raped by two men in a blue van, who knew her husband and attacked her to get back at him. [T2/17/108]* At trial, Ms. Lewis' testimony was that she had been attacked by three men, in cluding both respondents and an unknown third man, in Mr. Molinar's car: a black Thunderbird sedan with red pinstripes. [P/3/300; P/6/100; T1/3/586].

Second: Respondents would point to the petition's characterization of defense motions for mistrial as relating to "various evidentiary rulings" [petition, p.3]. One of the defense mistrial motions had to do with the trial court's continued interruption of defense counsel on cross-examination. [T1/11/158]. A second had to do with the court's

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* The respondents were tried twice. Both trials were tape recorded, as was the prelimiary hearing. Citations indicate either preliminary hearing (P), trial number (T1 or T2), tape number, and counter number from a General Electric, Model 3-5157B, tape recorder, with approximately 650 counters per side.

comment to defense counsel, before the jury, "Any time I open a can of worms, counselor, you can go fishing." [T1/9/340; T1/11/306]. The court ruled its own remark could be cured with an admonition to the jury, commenting it was "injecting a little humor". [T1/11/370, 405]

Third: The most serious inaccuracies of the petition concern the events leading up to the mistrial declaration [petition 3-4]. It is the case that the state made a motion in limine to prevent defense counsel eliciting the opinion of either of the two State Police witnesses as to whether they believed Ms. Lewis. [T1/17/52].

It is emphatically not true that defense counsel "was not sure he would solicit Officer Garcia's opinion" [petition 4]. Defense counsel informed the trial court he was not intending to ask Officer Garcia any such question. [T1/17/71]. Defense counsel argued his basis for asking the question of Lieutenant Medina: that Lt. Medina's disbelief was already in the police report of a state's witness who had been questioned extensively on that report; that defense counsel planned to qualify Lt. Medina as an expert in law enforcement; and that Lt. Medina's testimony on that point would directly contradict Ms. Lewis' direct testimony that the State Police had told her they did not have jurisdiction to investigate her claim of someone impersonating a State Police Officer. [P/4/210; T1/17/75-95].

The trial court stated it was granting the motion in limine. [T1/17/110]. Defense counsel renewed his request to be able to impeach Ms. Lewis' prior testimony. [Id.:100]. The trial court stated, "That's allowed, but he is not entitled to have an opinion."[Id.:110]. After commenting that if the defendants were found guilty, Lt. Medina ought to

be fired [Id.:130], the trial court instructed defense counsel," you will advise him [Lt. Medina]..." [Id.:144].

At this juncture, the state had already rested its case in chief [T1/6/369]. The court considered adjourning for the day, but allowed the defense to begin its case, commenting, "You're the one that wants to get this show on the road." [T1/7/150]. The first defense witness was Teena Cherryhomes, whose testimony concerned the physical aspects of Mr. Molinar's car. [Id.:167-270]

The second defense witness was Officer Sam Garcia. The fourth question on re-direct examination of this witness was, "So, since she never came to you with a complaint, you did nothing to dissuade her from proceeding with a complaint".[T1/8/20]. Officer Garcia's response was, "No sir, not dissuading her from filing a complaint. What I was telling her, she --- to be real frank with you, I didn't believe her, or what she was saying."[Id.:21].

At this point, the trial court interrupted the witness:

> [Court] That did it. Now I don't really care for your opinions. And that wasn't necessary. And you've just --- you've just caused a mistrial. And I don't like the way you and your partner are acting in this case. I want you to know that from me. Is that clear?
>
> [Witness] That's very ---
>
> [Court] I don't --- now get out!

Following this exchange, the court told defense counsel that it had instructed him to tell both officers not to give their opinions, declared a mistrial and banged his gavel. [Id.:30]

Defense counsel asked for a jury recess. [T1/18/40] After the jury left, the court asked the state to move for a mistrial. [Id.:44]. The prosecutor declined to move for a mistrial, both then and at a later opportunity, when the prosecutor commented that he recognized the

defense could move for a mistrial based on the exchange [before the jury] between the court and defense counsel. [Id.:118].

Defense counsel made a clear record that he did not intend to elicit the remark from the witness [Id.:65, 73], and that he had never received information from that witness that he didn't believe Ms. Lewis [Id.:138]. Counsel also reaffirmed for the record that the court's sua sponte mistrial declaration was being made over defense objection [Id.:183].

Fourth: The petition filed with this Court alleges that the question defense counsel asked Officer Garcia was "not necessary to counter Ms. Lewis' testimony" [petition at 4]. This is factually inaccurate. Ms. Lewis had testified that she went to Lt. Medina and Officer Garcia with allegations of Mr. Molinar impersonating a State Police Officer and harassing her, and that they told her it was not in their jurisdiction and they didn't want to step on anyone's toes [P/4/210; T1/3/594; T1/5/198]. Ms. Lewis had also testified she did not file any formal complaint then or throughout the alleged harassment. [T1/3/620; T1/6/280]. The question asked by defense counsel was whether Officer Garcia had done anything to dissuade Ms. Lewis from filing a complaint.

Fifth: The petition's statement of the case omits significant differences between the first trial and the second. These omissions bear not only on the weight to be accorded the New Mexico Supreme Court's decision, but also upon whether the "Question presented" in the petition could even dispose of this case.

The state presented two witnesses at the second trial who were not at the first: one, the state had neglected to subpoena [Officer Mounce:

T2/15/298], and on the other [Tibercio Carrasco], the state had not obtained service [T2/20/306; RP204]. These two witnesses were brought specifically to attack details of Mr. Molinar's defense.

Also, at the first trial, at the conclusion of the state's case in chief, the prosecutor asked to play for the jury a tape recording of Ms. Lewis sobbing agreement to a police officer's leading questions, while she was an inpatient at a mental hospital. [T1/15/205] After listening to the tape, the court excluded it as cumulative; as more prejudicial than probative; and specifically ruling it was not admissible to show "state of mind". [T1/16/92]. The court also commented that the tape might have been admissible if it had been brought while Ms. Lewis was on the stand, so that the defense could cross-examine her on it. [Id.]

At the second trial, the prosecution again moved the introduction of the tape -- again after Ms. Lewis had left the stand -- and this time the court allowed it to be played for the jury. [T2/7/268]. In response to defense counsel's repeated request for a ruling as to the legal basis for admitting the tape, the court finally told defense counsel "you could say that [it's 'state of mind']". [Id.:325]. Defense counsel made record of objections that the tape was made at a time too far removed from the events; that it was not subject to cross-examination; and that the jury would be unable to make any assessment of Ms. Lewis' demeanor. [Id.:329]. The court overruled all objections. [Id.:333].

The court told defense counsel he could cross-examine Ms. Lewis on the tape after it was played for the jury [Id.:289], but then refused to call her back to the stand that day. [Id.:570] Instead, the prosecution was allowed to call two more witnesses, then the jury was sent home for the night. [Id.; T2/8/358].

## SUMMARY OF REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The question presented by the petition in this case, even as phrased, turns on the correctness of a finding of "manifest necessity", which is always a highly fact-specific determination. Therefore, any review of this case would be highly unlikely to be of guidance to other courts, since the facts would never be identical.

The decision of the New Mexico Supreme Court involves its exercise of its original jurisdiction over inferior courts within New Mexico, because the decision was made on a writ of certiorari to the New Mexico Court of Appeals. N.M. Const., Art.VI, § 3. The decision also intrinsically involves the New Mexico Supreme Court's evaluation of the conduct of a district court, as part of its pre-eminent powers to regulate the practice of law within the state, and to have superintending control over all inferior courts. Therefore, the decision concerns procedure within those courts.

The factual inaccuracies and omissions of the petition significantly undermine all arguments advanced in the petition for granting of certiorari. The dissent in the New Mexico Court of Appeals, and the majority of the New Mexico Supreme Court, disagree with the facts advanced in the petition to this Court.

Further, this case would not necessarily be disposed of by the granting of certiorari on the issue as presented in the petition. Because of the New Mexico Supreme Court's decision as to double jeopardy, it did not address other issues preserved and briefed before it.

## ARGUMENT AGAINST GRANTING CERTIORARI

### 1. FACTUAL INNACURACIES IN THE PETITION'S STATEMENT OF THE CASE, AND IN THE QUESTION PRESENTED, ELIMINATE ALL ARGUMENTS ADVANCED FOR GRANTING THE PETITION.

The question presented in the petition alleges that the court's ruling was other than it was. The petition states the judge had ruled "this testimony [the witness' opinion] was inadmissible". The actual ruling of the trial judge was that defense counsel should not ask a different witness his opinion, and that if that witness' opinion came in, there would be a mistrial. [T1/17/110, 144]

The petition goes on to further misstate the facts of the hearing on the motion in limine, and the declaration of the mistrial. It was only after the court had declared a mistrial sua sponte that it told defense counsel it expected him to admonish both witnesses. [T1/18/30].

The question actually asked by defense counsel was proper re-direct. The witness' answer was unresponsive and unexpected. The trial court refused to consider alternatives to a mistrial, even though the prosecutor would not request a mistrial, and the defense objected. [T1/18/45, 75, 183]

For these reasons, Respondents would rephrase the "Question presented" to read as follows:

> Does double jeopardy bar retrial of the defendants after the trial judge sua sponte declared a mistrial, without considering other curative alternatives, when a police officer testifying for the defense stated that he did not believe the alleged rape victim, after the trial judge had ruled a different witness could not give an opinion on the alleged victim's credibility, and warned that if that other witness' opinion came in there would be a mistrial.

The New Mexico Supreme Court's treatment of the case reflects conformance with this Court's choice, as stated in Gori v. U.S., 367 U.S. 364, 369 (1961), not to become preoccupied with the hypothetical

supposition that a trial judge could abuse his discretion and declare a mistrial to allow the prosecution a second chance after presenting a weak case. However, in the instant case, the state's case was significantly strengthened against Mr. Molinar at the second trial. See e.g. U.S. v. Kin Ping Cheung, 485 F.2d 689 (5th Cir. 1973) (no retrial after mistrial when prosecution used it to tactical advantage).

Rather, the New Mexico Supreme Court precisely held the state to its "heavy burden" in examining a situation in which mistrial was declared over the defendants' objection. Arizona v. Washington, 434 U.S. 497 (1978). The petition concedes the trial court in the instant case made no consideration of alternatives [petition 5]. When this is combined with the trial judge misquoting his own ruling and instruction to justify the mistrial declaration; with the New Mexico Supreme Court's finding that there was no misconduct by defense counsel; and with the prosecutor's refusal to state that he thought the inadvertant remark was so prejudicial as to require a mistrial; there is no support for the state's having carried its "heavy burden".

2. THE DECISION OF THE NEW MEXICO SUPREME COURT IS TOO FACT SPECIFIC TO OFFER GUIDANCE TO OTHER COURTS

As the petition acknowledges [at 6], this Court has declined to provide any mechanical test for determining whether "manifest necessity" exists. United States v. Jorn, 400 U.S. 470, 480 (1971). The fact-specific nature of "manifest necessity" determinations has been a reality recognized since the phrase was used in United States v. Perez, 9 Wheat. 579 (1824). While certain sets of recurring circumstances,

such as the inability of the jury to reach a verdict, have been held to equal "manifest necessity" on many occasions, the instant case presents no such commonly recurring circumstance nor bright line. The balancing of how prejudicial an unexpected remark is to the state's case, and how effectively it may be cured by an admonition to the jury or some curative measure other than a mistrial, must vary infitiely with the strength of the prosecution's case, the credibility of the witness who makes the remark, and a myriad of other factors.

The petition argues for this Court's consideration as a means of giving guidance to trial courts as to how they should make a record of considering alternatives [petition at 11]. However, this Court's decision in United States v. Jorn to avoid a mechanical rule also militates against any absolute rule as to "how much" record of consideration of alternatives is enough.

The facts of the present case are not of the kind which will recurr as an inevitable part of the judicial process, such as a "hung jury". Rather, the correctness of the New Mexico Supreme Court's decision still turns on an evaluation of peculiar combinations of fact-bound circumstances. Therefore the decision's import, even within New Mexico, is largely limited to the parties involved. For thess reasons, also, Respondents respectfully urge this Court to deny the petition for certiorari.

3. THE NEW MEXICO SUPREME COURT'S DECISION INVOLVES ITS ORIGINAL JURISDICTION OVER INFERIOR COURTS WITHIN THE STATE AND SHOULD NOT BE DISTURBED

The New Mexico Constitution, Article VI, § 3, specifies:

> The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

The part of the New Mexico Supreme Court's original jurisdiction for which the power to issue writs of certiorari is "necessary or proper" is its superintending control over all inferior courts. Although the opinions of the New Mexico Supreme Court apply the Double Jeopardy prohibition of the U.S. Constitution's Vth Amendment, they also necessarily involved an evaluation of the conduct of the inferior courts of the state. To the extent that this was procedural guidance within the state, in the exercise of the original jurisdiction of the New Mexico Supreme Court, the decision is not purely appropriate for review by this Court on the basis alleged in the petition.

## CONCLUSION

For all the reasons stated above, Respondents respectfully request this Court refuse to grant the petition for certiorari filed in this cause, and leave undistrubed the decision of the New Mexico Supreme Court. U.S. Const., Amends. V, XIV.

Respectfully submitted,

MICHAEL E. VIGIL
Marchiando, Vigil & Voegler
P.O. Box 568
Albuquerque, New Mexico 87103
(505) 247-0751

Counsel of Record

PETER B. RAMES
Assistant Appellate Defender
Public Defender Department
142 Lincoln Avenue, Suite 500
Santa Fe, New Mexico 87501
(505) 827-3900

Counsel for Respondents

I hereby certify that I served a copy of this Brief in Opposition on Charles H. Rennick, Counsel of Record for the State of New Mexico in this matter, by hand-delivery, on the 14th day of May, 1990.

Peter B. Rowes